

POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

CUSTOM HOME, FARM & NURSERY  
SUPPLY,

Appellant,

v.

SPOKANE COUNTY AIR POLLUTION  
CONTROL AUTHORITY,

Respondent.

PCHB No. 90-45

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

On March 7, 1990 Custom Home, Farm & Nursery Supply ("Custom") filed an appeal with this Board contesting the Spokane County Air Pollution Control Authority's ("SCAPCA") issuance of Notices of Violation (Nos. 4373, 4374, 4375; \$2100 total) for alleged violations of state and local air pollution laws.

A hearing was held on April 24, 1990 in Spokane, Washington. Present for the Board was Chair Judith Bendor. Mr. Al West, President of Custom, represented the appellant company. Attorney Steven C. Miller represented respondent SCAPCA. Court reporter Caryn E. Winters

1 of C.W. Reporting (Spokane) recorded the proceedings. Argument was  
2 made. Testimony was given and exhibits admitted. By agreement of the  
3 parties, a video tape was received into evidence, filed on  
4 May 16, 1990. Board members Wick Dufford and Harold S. Zimmerman have  
5 reviewed the record.

6 From the foregoing evidence and argument, the Board reaches these:

7 FINDINGS OF FACT

8 I

9 Al West is the president and co-owner of Custom Building Supply,  
10 aka Custom Home, Farm & Nursery Supply ("Custom"). The company is  
11 located at 10812 West Geiger Blvd., Spokane, Washington. The company  
12 had operated a cedar re-manufacturing plant. In December, 1989 the  
13 plant was closed down.

14 II

15 On December 22, 1989, Friday, a SCAPCA environmental engineer  
16 responded to several complaints regarding a fire. He arrived at the  
17 Custom at about 1:00 or 2:00 p.m., where he saw three large piles on  
18 fire. They contained untreated cedar, treated lumber and demolition  
19 wood from a structure. The piles were each approximately 50 to 60  
20 feet in diameter, 10 to 12 feet in height at the center, and contained  
21 about 30 to 40 cubic yards of material per pile. Dense smoke was  
22 rising from the burning piles.

III

Fire District No. 3 arrived on site in response to several complaints. The District determined there was no safety hazard and the cost for extinguishing would be exorbitant. After informing the SCAPCA engineer and Mr. West, the Fire District left without putting out the fires.

IV

The SCAPCA engineer wrote a field notice of violation. He approached Mr. West who was driving a wheeled cat or a tractor, to have him sign the notice. He told West to put out the fires which he refused to do. West also refused to sign the notice. He told the SCAPCA engineer to leave the property. Clearly, heated words were exchanged. The Board finds, however, after reviewing the evidence, that it has not been established that West attempted to run over the engineer or intentionally bumped into him while on foot.

V

The engineer radioed for the sheriff, and returned to the property in the company of a deputy. There he saw West feeding the fire using the tractor to replenish material where the fires were going out. He again asked that West sign the notice of violation; he again refused. West told the deputy to escort the engineer off the property, and the two left.

VI

The next day, on Saturday, the engineer returned at about noon. The fires were still burning. West was using a kerosene torch to keep the fires going. He had been tending the fires all night. The engineer told West he would issue another notice of violation, and would issue one each day the fires continued to burn.

After this exchange, West contacted SCAPCA's Control Officer who said that the fires should be put out. West leveled the piles and put sprinklers on top.

VII

On January 17, 1990 SCAPCA issued three Notices of Violation: No 4373 (\$1,000) for alleged violation of Article VI, Section 6.01 of SCAPCA Regulation I, and WAC 173-425, for the first day's burn; No. 4374 (\$100) for alleged violation of Regulation I, Article II, Section 2.02(E) and RCW 70.94.200 for alleged interference with the first day's inspection; and No. 4375 (\$1,000) for the second day's burn (same legal allegations as No. 4373). Custom appealed the penalties to this Board, which became our PCHB No. 90-45.

VIII

Additional history that occurred prior to the burn events reveals that West had an oral agreement in early December with a Florida company to lease part of his Geiger Blvd. property, but the company would not take possession until the yard was cleared of lumber and

1 other materials. West contacted the Fire District chief some time  
2 that month in an effort to obtain a burn permit. The chief told West  
3 that a fire permit would not issue. In response to West's suggestion  
4 that the fire be used for a training exercise, the chief said there  
5 was no benefit to the District in using it for an exercise.

6 West had also contacted SCAPCA about burning the piles. The  
7 SCAPCA engineer informed him that no prohibited materials could be  
8 burned, and inspected the piles and pointing out prohibited  
9 materials. West did not inform SCAPCA that the Fire Department did  
10 not have use for the burn as a training exercise. Ultimately, SCAPCA  
11 learned that a fire permit would not be issued.

#### 12 IX

13 Appellant West admitted he burned the piles knowing that he did  
14 not have a permit to do so and that one was required. He only began  
15 to investigate the alternative of hauling the material away on  
16 December 22, 1989. The cost of disposing of this material in a  
17 landfill would have been \$8,000 to \$10,000. He called two companies  
18 and was not successful in obtaining their immediate services.

19 Mr. West claims he had no choice; that he had to burn without a  
20 permit because of the lease situation. He further implied that he was  
21 misled by SCAPCA to believe that a permit would issue and the time  
22 bind was due to their conduct. He argues that the entire penalty  
23 should therefore be abated.

1 We are unconvinced that Mr. West was misled. Moreover, the  
2 timing was largely West's choice, as to when he initiated his inquiry  
3 and the lease transaction. West also failed to inform SCAPCA about  
4 the Fire District's determination. As to whether penalties should be  
5 upheld or reversed, this will be addressed in the Conclusions of Law  
6 section.

7 X

8 Any Conclusion of Law deemed a Finding of Fact is adopted as such.  
9 From these Findings of Fact, the Board comes to these Conclusions  
10 of Law:

#### 11 CONCLUSIONS OF LAW

##### 12 I

13 The Board has jurisdiction over these parties and these issues.  
14 Chpts. 43.21B and 70.94 RCW. SCAPCA has the burden to show by a  
15 preponderance of the evidence that the violations occurred.

16 The State Clean Air Act, Chapt 70.94 RCW, and its implementing  
17 regulations (in conjunction with the Federal Clean Air Act), provide  
18 the initial state air pollution legal framework. Local air pollution  
19 authorities adopt their own regulations consistent with state law, and  
20 implement both the state statute and regulations, and their own  
21 regulations as well. See RCW 70.94.141, 331(6), 380.

##### 22 II

23 The Clean Air Act at RCW 70.94.740 states that outdoor fires are  
24 allowed on a limited basis under strict regulation and control.  
25

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER  
PCHB No. 90-45

(6)

1 SCAPCA has adopted regulations to deal with open burning,  
2 generally found at Article VI, Section 6.01. That section states that  
3 open fires require a permit from the local fire department or fire  
4 officials. Custom violated this provision, and did so knowingly,  
5 making a deliberate decision to do so based on his business and  
6 economic considerations.

7 This violation is serious. The permit system is an essential  
8 component of ensuring compliance with outdoor burning programs. See  
9 RCW 70.94.745, and 755. Custom, through its president, willfully  
10 violated this requirement. SCAPCA, however, chose to charge Custom  
11 with a civil violation, rather than a gross misdemeanor. See Article  
12 II, Section 2.01; RCW 70.94.430 and 431.

### 13 III

14 Even permitted open fires can only be burned during daylight  
15 hours. Article VI, Sect. 6.01.5.d.1. Custom burned the fires  
16 through the night. Additionally, its president took active measures  
17 to continue the burning, doing so into the second day, after having  
18 been told on the previous day that the fire had to be put out.  
19 Custom committed a separate violation on the second day, December 23,  
20 1989.

### 21 IV

22 Under the Washington Clean Air Act outdoor fires are limited to  
23 materials of a natural character. See RCW 70.94.745; 770; 775.

1 Treated lumber and demolition wood are not of a natural character and  
2 therefore cannot be burned in an open fire under the state statute.

3 WAC 173-425-045 lists prohibited material, but does not  
4 specifically list treated lumber or demolition material as  
5 prohibited. But the fires did emit dense smoke. Numerous complaints  
6 were received. WAC 173-425-045(8) prohibits the burning of material  
7 "Other than natural vegetation" which normally emits dense smoke. RCW  
8 70.94.775(1) has the same prohibition<sup>1/</sup>. Moreover, Section 6.01.5.c  
9 states: "Only the materials noted herein shall be burned." Treated  
10 lumber and demolition material are not listed as allowed.

11 We conclude that Custom burned prohibited material.

12 V

13 Regulation I, Article VI, Section 2.02.E. states that a duly  
14 authorized representative of the Air Pollution Control Officer has the  
15 power to enter, at reasonable times, upon any private property for the  
16 purpose of investigating conditions specific to the control, recovery  
17 or release of air contaminants into the atmosphere. We conclude that  
18 the SCAPCA engineer was such a representative, entering the property  
19 at a reasonable time to investigate air contaminant release.

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21  
22 <sup>1/</sup> We decline to cite SCAPCA's regulations in this regard because  
23 they are not as clear as state regulations.



1 2.02.E further provides that:

2 ...No person shall refuse entry or access  
3 to the ...representatives who request entry  
4 for the purpose of inspection and who presents  
5 appropriate credentials, nor shall any person  
6 obstruct, hamper or interfere with any such  
7 inspection. (RCW 70.94.200)

8 SCAPCA contends that Custom violated this provision by attempting  
9 to run over the engineer and intentionally bumping into him. We have  
10 found, by a preponderance of the evidence, that this did not occur.  
11 See Finding of Fact, IV, above. Within the narrow confines of the  
12 case as presented and argued to us, we conclude that Article VI,  
13 Section 2.02.E has not been violated. The \$100 penalty has to be  
14 reversed.

15 In so concluding, we do not condone in any way Mr. West's conduct  
16 towards SCAPCA's representative.

#### 17 VI

18 Civil penalties are issued to promote compliance with the law.  
19 In this case, Custom, through its president Al West, willfully burned  
20 vast quantities of lumber, knowing that a permit was required and that  
21 none had been issued. The \$2,000 in penalties are amply justified.

#### 22 VII

23 Any Finding of Fact deemed to be a Conclusion of Law is adopted  
24 as such.

25 From these Conclusions of Law the Board enters this:

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER

ORDER

Notices of Violation No. 4373 and 4375 (\$2,000) are AFFIRMED.

Notice of Violation No. 4374 (\$100) is REVERSED.

DONE this 25<sup>th</sup> day of May, 1990

POLLUTION CONTROL HEARINGS BOARD

  
JUDITH A BENDOR, Presiding

  
WICK DUFFORD, Member

  
HAROLD S. ZIMMERMAN, Member